

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT CASTORENA,

Defendant and Appellant.

C084466

(Super. Ct. No. 96F08171)

In 1999, defendant Robert Castorena pleaded no contest to charges of murder and attempted murder. Pursuant to the terms of the plea agreement, defendant was sentenced to serve a term of 15 years to life in state prison for the murder conviction and committed to the state hospital for his attempted murder conviction, pending restoration of his sanity. The court ordered defendant to serve those sentences concurrently, pursuant to the negotiated plea agreement, and ordered him to pay a \$2,500 restitution fine.

In 2014, defendant's sanity was deemed restored. He appeared in the trial court in 2016 and was again sentenced to serve 15 years to life for his murder conviction. The

trial court also sentenced defendant to serve a concurrent term of three years for assault with a deadly weapon, refused him custody credits for the time he was committed to the state hospital, and ordered him to pay various fines and fees.

Defendant appeals, raising numerous errors committed by the trial court at the 2016 hearing. The People concede every error. We accept the People's concessions, amend the judgment, and direct the trial court to prepare an amended abstract of judgment and to amend the minutes from the 2016 hearing.

BACKGROUND

In November 1996, the People charged defendant with murder, committed sometime between September 30, 1996 and October 3, 1996, and two counts of assault with a deadly weapon, both occurring on October 3, 1996. The People further alleged defendant personally used a knife during the commission of the murder.

Defendant was found not competent to stand trial in June 1997. His competency was restored in November 1998. In May 1999, defendant and the People negotiated a plea agreement.

Under the terms of the negotiated plea agreement, the charges of assault with a deadly weapon and the allegation that defendant personally used a weapon were dismissed; a charge of attempted murder was added to the information. Defendant pleaded no contest to second degree murder, agreed he was sane during the commission of that crime, and agreed to a sentence of 15 years to life in state prison. He also pleaded no contest to attempted murder, agreed he was insane during the commission of that crime, and agreed to be committed to the state hospital for up to a life term. The parties agreed the prison sentence would run concurrent to the state hospital commitment. They also agreed that if defendant were ever released from the state hospital, he would be transferred to state prison to serve the remainder of his prison term.

Following entry of his plea, defendant waived his right to a probation report and the trial court imposed sentence according to the terms of the plea agreement. The court

also ordered defendant to pay a \$2,500 restitution fine pursuant to Penal Code former section 2085.5, subdivision (a) (Stats. 1995, ch. 313, § 12, pp. 1764–1766, eff. Aug. 3, 1995; ch. 377, § 6, pp. 1945-1946, ch. 876, § 4, pp. 6673-6675),¹ and awarded him custody credits totaling 1,399 days (933 actual and 466 conduct). The court then remanded defendant to the custody of the sheriff for delivery to the Atascadero State Hospital.

On October 10, 2008, the trial court heard Atascadero State Hospital’s petition to find defendant’s sanity restored. The court found defendant continued to be a danger to himself and others, denied the petition, and ordered defendant to remain at the state hospital. The court also considered the potential impact of *People v. Chavez* (2008) 160 Cal.App.4th 882 on defendant’s plea agreement. In particular, the court considered whether the parties’ agreement that defendant’s prison sentence would run concurrent to his state hospital commitment was lawful under the recent decision. The court concluded that, under the *Chavez* decision, the agreement was not permissible; however, because it was an integral part of the parties’ negotiated plea agreement, under which the parties had been operating for nine years, it would be unjust to set aside, modify, or withdraw the plea agreement. The court thus left the plea agreement intact.

On December 11, 2014, defendant’s sanity was deemed restored. Following a referral to the probation department, the parties appeared before the trial court on April 7, 2017, for sentencing. The court explained its understanding that the sentence imposed on defendant’s conviction for murder was “stayed” while defendant was committed to the state hospital pending restoration of his sanity. The court then sentenced defendant to serve a term of 15 years to life in state prison for his murder conviction.

¹ Undesignated statutory references are to the Penal Code.

The court continued to sentence defendant as follows: “By reason of your plea to Count 2, which is a violation of . . . section 245(a)(1), assault with a deadly weapon or instrument, you’ll receive a concurrent term, mid-term, of three years.” The court found, “there [were] no credits for the period that [defendant] was in state hospital,” awarding defendant 1,721 days of custody credit. Defendant appealed.

DISCUSSION

I

Defendant is Entitled to Custody Credit for the Time he Was in the State Hospital

Defendant contends the trial court erred by refusing to award him credit against his prison sentence for the time he spent in the state hospital working to restore his sanity. The People agree, based on estoppel grounds, defendant is entitled to receive credit for the days he spent in the state hospital. We accept the People’s concession.

In 1999, the parties negotiated a plea agreement and agreed defendant’s prison sentence would run concurrent to his state hospital commitment. They agreed that, should defendant’s sanity be restored, he would serve the *remainder* of his prison term in state prison. Thus, while the law may no longer authorize such a sentence, the parties are estopped from changing the sentence to which they already agreed. (Cf. *People v. Hester* (2000) 22 Cal.4th 290, 295 [defendants are estopped from complaining about sentences to which they agreed].)

We will direct the trial court to calculate the number of days defendant was in the state hospital following his conviction and amend the judgment accordingly.

II

Defendant Is Entitled to Additional Custody and Conduct Credit

A.

Waiting to Restore Competency before Sentencing

Defendant contends he is entitled to additional conduct and custody credit for the time he was in jail prior to sentencing, waiting for his competency to be restored.

Relying on section 2900.5, the People agree. Having reviewed the record and applicable law, we accept the People's concession.

We will direct the trial court to calculate the number of days defendant was in custody prior to sentencing waiting for his competency to be restored, and amend the judgment accordingly.

B.

Section 2933.1 Applies, Not Section 2933.2

Defendant contends, and the People agree, the trial court incorrectly applied section 2933.2 to deny him conduct credits to which he was entitled under section 2933.1. "Section 2933.2 precludes the award of any presentence conduct credits following a conviction for murder. However, the statute's application is specifically limited to those offenses occurring after the date it became operative. (§ 2933.2, subd. (d).) Section 2933.2 became effective on June 3, 1998, following voter approval in the June 2, 1998 Primary Election." (*People v. Ly* (2001) 89 Cal.App.4th 44, 47.)

Here, defendant committed the murder for which he was convicted in October 1996, before the effective date of section 2933.2. (Stats. 1996, ch. 598, § 3, p. 3282.) Accordingly, that code section does not apply and we accept the People's concession. We will direct the trial court to calculate defendant's conduct credit and amend the judgment accordingly.

C.

Conduct Credits for Time in Custody, Waiting to Be Transferred

Relying on the decision in *People v. Bryant* (2009) 174 Cal.App.4th 175 at page 184, the People agree defendant also is entitled to conduct credits for the time he spent in custody but not being treated for incompetency. Having reviewed the record and relevant authority, we accept the People's concession and will direct the trial court

to calculate defendant's conduct credits for these time periods and amend the judgment accordingly.

D.

The Sentence Imposed for Assault with a Deadly Weapon Must Be Stricken

Defendant contends, and the People agree, the trial court erred in imposing a three-year prison term for assault with a deadly weapon. We accept the People's concession. Defendant pleaded no contest to murder and attempted murder; he did not plead to assault with a deadly weapon. Indeed, the charge for assault with a deadly weapon was dismissed.

Accordingly, we will strike the three-year sentence imposed by the trial court on April 7, 2017.

E.

The Restitution Fine Must Be Restored to \$2,500

The People also agree that at the April 7, 2017 hearing, the trial court erroneously increased defendant's restitution fine from \$2,500 to \$10,000. We accept the People's concession.

At the initial sentencing hearing in May 1999, the trial court ordered defendant to pay a \$2,500 restitution fine. Therefore, in 2017, the court lacked jurisdiction to modify that fine. (*People v. Gooch* (1995) 33 Cal.App.4th 1004, 1007.) We will modify the judgment and direct the trial court to amend the abstract of judgment accordingly.

F.

The Court Security Fee and Criminal Conviction Assessment Must Be Stricken

At the April 7, 2017 hearing, the trial court also ordered defendant to pay a court security fee (§ 1465.8) totaling \$80 and a criminal conviction assessment (Gov. Code, § 70373) totaling \$60. Neither of the statutes mandating these fees was operative when defendant was convicted in May 1999. (*People v. Alford* (2007) 42 Cal.4th 749, 753;

People v. Davis (2010) 185 Cal.App.4th 998, 1000.) Accordingly, defendant contends, and the People agree, the fees must be stricken. We accept the People's concession and will amend the judgment accordingly.

DISPOSITION

The sentence imposed for assault with a deadly weapon is stricken from the judgment, as are the fees imposed pursuant to Penal Code section 1465.8 and Government Code section 70373. The \$10,000 restitution fine is reduced to \$2,500.

The matter is remanded to the trial court and the trial court is directed to calculate defendant's custody and conduct credits consistent with this decision. The judgment is otherwise affirmed as modified.

The trial court is directed to prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

_____/s/
HOCH, J.

We concur:

_____/s/
RAYE, P. J.

_____/s/
HULL, J.